Supreme Court, U.S.
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No. 98-199

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ACCESS TELECOMMUNICATIONS, L.L.C.,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

This case will determine the continuing vitality of the filed rate doctrine and the scope of the primary jurisdiction doctrine under federal law. The filed rate doctrine prohibits a regulated carrier from charging its customers any rate not established by a filed tariff. Respondent Southwestern Bell, in violation of its filed tariff, increased the rate it charged Petitioner Access Telecommunications for telephone services that Access would resell in competition with Southwestern Bell. The district court dismissed Access' Federal Communications Act suit on the ground that the FCC had primary jurisdiction of the issue of the tariff violation. The Eighth Circuit affirmed finding that before Access could sue, the FCC should determine whether Southwestern Bell's violation of its tariff was nevertheless reasonable.

This petition presents the following question:

Should federal courts apply the doctrine of primary jurisdiction so as to eviscerate the filed rate doctrine by enabling a carrier accused of violating its filed tariff to seek *post hoc* agency ratification that the tariff violation was nevertheless reasonable?

LIST OF PARTIES

The Petitioner is:

Access Telecommunications, L.L.C.

The Respondent is:

Southwestern Bell Telephone Company

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OPINIONS BELOW

The opinion of the court of appeals is reported at 137 F.3d 605 (8th Cir. 1998). It is reprinted in the appendix ("App.") at 1A-8A. The district court's unpublished memorandum and order granting Southwestern Bell's motion to dismiss is reprinted at App. 9B-12B.

JURISDICTION

The court of appeals entered its judgment on February 26, 1998. On May 22, 1998, this Court extended the time for filing a petition for writ of certiorari to and including July 26, 1998. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are 47 U.S.C. §§ 201, 203, and 207. They are set out verbatim at App. 13C-16C.

STATEMENT OF THE CASE

A. The Parties and the Tariff.

Access was formed to compete with Southwestern Bell Telephone Company ("Southwestern Bell") to provide "local access" telephone service which connects customers' telephones to one or more long distance telephone services. Access provided that service by reselling to its customers the local access service provided by Southwestern Bell. In fact, Access was one of Southwestern Bell's largest customers for local access services, including Southwestern Bell's Special Access Voice Grade 7 Service ("VG7 service").

Southwestern Bell, as required by federal law, provides its telephone services pursuant to tariffs. Accordingly, Southwestern Bell drafted and filed its FCC Tariff No. 73 (the "Tariff") establishing its charges for various local access services, including VG7 service. Southwestern Bell's Tariff further provides that the use and configuration of VG7 is governed by a particular Technical Specifications Package

("TSP"), which Southwestern Bell also drafted and filed as part of the Tariff. Thus, Southwestern Bell created the Tariff (including the TSP) and asked the FCC to approve it. The FCC approved the Tariff at Southwestern Bell's request. Southwestern Bell is now required to provide local access services pursuant to the Tariff.

The Tariff states that Southwestern Bell will provide VG7 Service to its customers on a 2-wire or a more expensive 4-wire circuit, depending on the relevant circuit design parameters. The design parameters established in the Tariff's TSP do *not* take into consideration the length of the customer's local loop connection to Southwestern Bell's central office, which is essentially a measure of the length of the circuit.

In spite of the clear requirements of its own Tariff, Southwestern Bell arbitrarily began requiring customers with a local loop connection exceeding six thousand feet to obtain VG7 service on a 4-wire circuit, even though the customer was eligible for a less expensive 2-wire circuit under Southwestern Bell's Tariff. The six thousand foot limitation on 2-wire VG7 circuits now asserted by Southwestern Bell is not part of the Tariff or the TSP which were created by Southwestern Bell, filed by Southwestern Bell with the FCC, and conclusively define the local access services Southwestern Bell must provide to customers.

B. Course of Proceedings and Disposition Below.

Access brought suit under the Communications Act of 1934 on behalf of itself and other Southwestern Bell customers receiving VG7 service on the more expensive 4-wire circuit since January 1991, who were entitled under Southwestern Bell's Tariff to receive Southwestern Bell's VG7 service on a

less expensive 2-wire circuit. The district court had jurisdiction of the case under 47 U.S.C. § 207 and 28 U.S.C. §§ 1331, 1337. Southwestern Bell moved to dismiss the case. The district court dismissed the case, finding that the FCC had primary jurisdiction of the dispute.

The Eighth Circuit affirmed the district court's dismissal. The appellate court recognized the usual distinction made under the doctrine of primary jurisdiction between challenges to the reasonableness of a tariff, which are properly brought before an administrative agency and challenges that a tariff has been violated, which are properly brought before a court. App. 6A. However, the court characterized the issue as whether Southwestern Bell's use of a pricing classification not in the tariff was reasonable. App. 6A. On that basis, and without consideration of the filed rate doctrine, the court decided that the FCC had primary jurisdiction to determine whether the classification was reasonable. App. 7A.

REASONS FOR GRANTING THE WRIT

This petition asks the Court to consider whether the filed rate doctrine, the mechanism by which regulated carriers are prevented from engaging in price discrimination between ratepayers, should be eroded by the doctrine of primary jurisdiction. If carriers can violate their filed tariffs either by blatantly discriminating among ratepayers or by creating off-tariff pricing criteria which effect the same discrimination, and escape liability by seeking *post hoc* approval from an agency deemed to have primary jurisdiction of the issue, the filed rate doctrine is defunct.

The Eighth Circuit has sanctioned just such a demise of the filed rate doctrine by its application of the doctrine of primary jurisdiction in this case. Moreover, its ruling directly controverts this Court's decisions in *American Tel. & Tel. Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998) and *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) and other appellate decisions on point. If not corrected by this Court, the Eighth Circuit's decision threatens the regulatory framework which governs all common carriers and protects their customers.

I. The Court of Appeals' Decision Jeopardizes the Filed Rate Doctrine.

The Eighth Circuit gave no consideration to the impact its decision would have on the filed rate doctrine. In fact, the appellate court does not mention the doctrine in its opinion.

A. The Importance of the Filed Rate Doctrine.

"The filed rate doctrine (also known as the filed tariff doctrine) is the central principle of the regulatory scheme for interstate telecommunications carriers. It 'forbids a regulated

entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.'" *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 488 (2d Cir. 1998), quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). Under the Communications Act of 1934 (the "Act"), common carriers such as Southwestern Bell are required to initiate and file with the FCC for publishing a schedule of charges known as a tariff. 47 U.S.C. § 203(a); *Richman Bros. Records, Inc. v. U.S. Sprint Communications, Inc.*, 953 F.2d 1431, 1435 (3d Cir. 1991). In addition to the carrier's charges, the tariff must contain all "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a).

After a tariff is submitted to the FCC, the FCC may hold a hearing on the lawfulness of the tariff and determine if changes are needed. *Essential Communications Sys., Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114, 1120 (3d Cir. 1979). Absent FCC action, tariffs become effective and binding on the carriers by operation of law after a specified notice period. *American Tel. & Tel. Co. v. FCC*, 487 F.2d 864, 871 (2d Cir. 1973). Once a tariff is filed with the FCC, it "conclusively and exclusively control[s] the rights and liabilities between a carrier and its customer," *MCI Telecomm. Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993), and has the force of law. *MCI Telecomm. Corp. v. Garden State Inv.*, 981 F.2d 385, 387 (8th Cir. 1992). Therefore, carriers may not charge any rate different from that listed in the filed tariff, or utilize any practice or classification other than those outlined in the tariff. 47 U.S.C. § 203(c); *Richman Bros. Records*, 953 F.2d at 1435.

This Court just recently reiterated the need for strict application of the filed rate doctrine. *See American Tel. & Tel. Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998).

Published tariffs are not a mere convenience for carriers, but are essential to accomplishing the legislative intent of preventing discrimination and maintaining equal access to services: "The tariff-filing requirement is ... the heart of the common-carrier section of the Communications Act" because "'there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.'" *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229-30 (1994) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907)). Without mandating that carriers file tariffs, much of the Act's enforcement scheme would be useless. For example, no one could challenge the reasonableness of a carrier's rates or litigate their discriminatory application under § 203(c) if the rates were not publicly filed. *MCI Telecomm. Corp.*, 512 U.S. at 230-31 (citing *Maislin Indus., U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132 (1990)). "Rate filings are, in fact, the essential characteristic of a rate-regulated industry." *Id.* at 231.

In 1998 alone, this Court and twelve other federal courts decided cases on the basis of the filed rate doctrine. App. 17D.

B. The Decision Below Conflicts With This Court's Decisions in *Central Office Telephone* and *Maislin*.

The decision below is contrary to this Court's rulings in *American Tel. & Tel. Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998) and *Maislin Indus., U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). It will nullify the filed tariff as the conclusive determinant of a carrier's charges. Therefore, the Eighth Circuit's opinion is also contrary to the decisions of other federal courts which have relied on the filed tariff doctrine to judge the conduct of a carrier.

The decision's conflict with *Central Office Telephone* is clear. *Central Office Telephone* reaffirmed that in order to avoid discrimination, a carrier may not deviate from its duly filed rate. 118 S.Ct. at 1962-63. This case presents a clear deviation by Southwestern Bell from its tariff. There is no question that Southwestern Bell used criteria not in its tariff to increase prices to a customer/competitor. There is no question that the district court had jurisdiction under the Communications Act of 1934, 47 U.S.C. § 207, to hear Access' challenge to the violation. Yet, the Eighth Circuit refused to consider whether a violation occurred. Instead, the appellate court determined that the doctrine of primary jurisdiction enables Southwestern Bell to ask the FCC to find that its violation was a *fait accompli*.

Such *post hoc* agency ratification is directly at odds with *Maislin*. In *Maislin*, a carrier and one of its shipping customers independently agreed that the customer would pay a lower rate than that contained in the carrier's tariff, and operated under the special arrangement for two years. 497 U.S. at 123. The carrier never filed the privately negotiated rates with the ICC. *Id.* When the carrier later went bankrupt, the agents of the bankrupt estate sought to collect the undercharges, i.e., the difference between the lower rate the customer had paid for two years and the higher tariffed rate. *Id.* The customer refused to pay, citing the prior, privately negotiated agreement. *Id.* When the bankrupt carrier sued, the customer claimed that the carrier's attempt to collect the undercharges in spite of the off-tariff agreement was an unreasonable practice under the Interstate Commerce Act, that the tariff rates were unreasonable, and that the tariff was preempted by the private agreement. *Id.* The district court referred the case to the ICC under the doctrine of primary jurisdiction. *Id.*

The ICC ruled in favor of the customer, reasoning that the filed rate doctrine, which requires carriers to abide by the filed tariff in all circumstances, would produce an unfair result because the customer would bear the cost of the carrier's violation of the Interstate Commerce Act. The ICC concluded that it had the power to "consider all the circumstances" and "any other pertinent facts," and determine whether it was reasonable to require the carrier to abide by the tariff. *Id.* at 123-24. Under the circumstances, the ICC decided to set aside the filed rate doctrine and not allow the carrier to collect the tariff rates in order to punish the carrier for its violations of the statute. *Id.* at 124-25.

This Court disagreed with the ICC, unequivocally stating that the agency did not have the authority to abrogate the filed tariff, regardless of the circumstances. *Id.* at 130. The Court noted that the statutory provision mandating that carriers file tariffs and charge only the rates listed in their tariffs was crucial to the Interstate Commerce Act's purpose of preventing discrimination. *Id.* at 132. Rejecting the ICC's argument that it was punishing the carrier's failure to file the new rates by holding it to collection of only the lower unfiled rates, the Court ruled that "sanctioning adherence to unfiled rates [ ] undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of unfiled rates." *Id.* at 132. The Court found that the agency simply did not have the authority to "alter the well-established statutory filed rate requirements." *Id.* at 135.

The Eighth Circuit would allow Southwestern Bell to seek an FCC review of its deviation from its filed rate on the chance that the agency may find it reasonable. However, under *Maislin*, the FCC cannot absolve Southwestern Bell of

violating its Tariff. Because the practice of using local loop length as a standard for VG7 service is not contained in any filed tariff, the FCC cannot determine the "reasonableness" of this practice and abrogate Southwestern Bell's obligation to refund the overcharges it collected in contravention of the Tariff that is on file. The FCC has no role to play in the legal or regulatory review of the Tariff; thus, referral of this case to that agency on the basis of primary jurisdiction is pointless and undermines the filed rate doctrine.

If Southwestern Bell wishes to use a new standard to determine the price of VG7 service, it must file an amended tariff. Instead, Southwestern Bell chose to ignore the statute (thereby escaping the notice requirements and FCC review) and simply raised the price of VG7 service for some of its customers based on a new standard not contained in the original Tariff, and without filing an amended tariff - exactly the type of uncertainty and discrimination the filed rate doctrine was designed to eradicate.

II. The Court of Appeals' Decision Improperly Expands the Doctrine of Primary Jurisdiction.

Not only does the decision below impinge the filed rate doctrine, it is an improper expansion of the doctrine of primary jurisdiction. Although the doctrine of primary jurisdiction may apply to a dispute regarding the reasonableness of a tariff's provisions, it is inapplicable to cases that concern the enforcement of an existing tariff. *National Communications Ass'n v. American Tel. & Tel. Co.*, 46 F.3d 220, 223 (2d Cir. 1995). While the statutory reasonableness of a tariff is an abstract concept requiring the FCC's technical and policy expertise and is a matter particularly within the agency's discretion, the construction of an existing tariff is not, and is appropriately addressed by a federal court. *MCI Telecomm.*

Corp. v. John Mezzalingua Assoc., Inc., 921 F. Supp. 936, 941 (N.D.N.Y. 1996).

Access does not question the validity or reasonableness of Southwestern Bell's Tariff. On the contrary, Access seeks to enforce it. The distinction between a challenge to a tariff's reasonableness and a claim that a tariff has been violated is crucial to the exercise of primary jurisdiction, as this Court has recognized: "[I]t must be borne in mind that there are two forms of discrimination,--one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the [agency] . . . . But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, [and] the court [is] being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage." *Pennsylvania R. R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 131-32 (1915).

Applying that rationale, the court in *Bruss Co. v. Allnet Communication Serv. Inc.*, 606 F. Supp. 401 (N.D. Ill. 1985), refused to decline jurisdiction in a case alleging that the defendant had violated 47 U.S.C. § 203(c), the same violation Access asserts. In *Bruss*, the plaintiffs brought a class action against Allnet for charging the plaintiffs an excessive rate for long distance service in contravention of the applicable tariffs. 606 F.Supp. at 404. Allnet moved to dismiss the lawsuit on the grounds that the FCC had primary jurisdiction. *Id.* at 408.

The *Bruss* court recognized that the plaintiffs were not claiming that the defendant's tariffs were unfair or unreasonable, a matter that would be within the primary jurisdiction of the FCC, but instead were contending only that Allnet had violated its filed tariffs by charging rates that exceeded those provided in the tariffs. *Id.* at 409. The court held that a claim "challenging not the reasonableness of a tariff, but only whether the carrier has failed to abide by the tariff " does not raise issues requiring agency discretion or expertise. *Id.* The court realized that it was not being asked to set or alter an FCC tariff, but that the only issue presented was whether the tariffs "were in fact violated, [which was] a matter clearly within the province of the federal courts." *Id.*

Access's suit was based on the very fact that Southwestern Bell's practice of setting an arbitrary loop length limit for 2-wire circuits is inconsistent with the Tariff. Access has not requested a reinterpretation or re-drafting of the Tariff, but only remedies for Southwestern Bell's failure to comply with the Tariff as written – no more than the filed rate doctrine demands of all regulated carriers.

CONCLUSION

Access' petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 27, 1998

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2124

Access Telecommunications,
debtor-in-possession on behalf of itself and all
others similarly situated, formerly known as
Unified Telecommunications, L.L.C.,

Appellant,

v.

Southwestern Bell Telephone Company,

Appellee.

Submitted December 12, 1997

Decided February 26, 1998

David A. Streubel, St. Louis, MO argued
(David W. Harlan and Emily A. Kirk, on the brief),
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(Thad Hollie, St. Louis, Mo., on the brief),
for appellee.

Before BOWMAN, WOLLMAN, and LOKEN,
Circuit Judges.

BOWMAN, Circuit Judge.

Access Telecommunications (Access) appeals the order of the District Court[1] dismissing its claim against Southwestern Bell Telephone Company (SWBT). Access had filed a class action under the Communications Act of 1934, *see* 47 U.S.C. §§ 202, 203, 2097 (1994), alleging that SWBT had been overcharging for telephone access services. SWBT moved to dismiss the action, arguing that primary jurisdiction to decide the issues rested with the Federal Communications Commission (FCC). In its opinion, the District Court noted that a party claiming damages against a common carrier such as SWBT generally had its choice to file a complaint either with the FCC or in federal court. *See* District Ct. Order at 2. But in the end the District Court agreed with SWBT and dismissed the action. This appeal followed.

Access claims that the FCC does not have primary jurisdiction over the issues presented in this case. Access argues that the District Court erred in dismissing the action because none of the reasons for invoking the primary jurisdiction doctrine is present. Access further asserts that, even if the FCC does have primary jurisdiction, the District Court should not have dismissed but instead should have stayed the action.

I.

Access resells long-distance services by connecting customers to various long-distance providers. Access uses SWBT's local lines to offer the service. SWBT allows resellers such as Access to control the quality and cost of the

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[1] The Honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

interconnection by giving them a choice of twelve different voice grades (VGs). The VGs range from one to twelve with VG 1 representing the lowest level of quality and VG 12 representing the highest level of quality. Quality is measured in terms of factors such as distortion and echo control. Charges for the interconnection increase as the level of VG increases. In this case, Access sought to purchase VG 7 service from SWBT.

As required by federal law, common carriers must file with the FCC tariffs setting forth a schedule of charges for the various services they provide. *See* 47 U.S.C. § 203. Accordingly, SWBT filed Tariff No. 73 (the Tariff), which established charges for each VG level. The FCC approved the Tariff, and now SWBT must provide access services pursuant to the terms of the Tariff. *See id.* § 203(c).

SWBT provides VG 7 service on either a two-wire circuit or a more expensive four-wire circuit. The Tariff sets forth two schedules, indicating the price for each circuit. *See* J.A. at 91 (Tariff 7.3.4(G)(1)). Thus, a VG 7 interconnection on a four-wire circuit has a higher price schedule than a VG 7 interconnection on a two-wire circuit. The Tariff indicated that the VG 7 service must conform to specific transmission standards, *see id.* at 73 (Tariff 7.3.1(B)), meaning that items such as attenuation distortion, echo control, impulse noise, and phase jitter cannot fall to unacceptable levels. These standards are to ensure the quality of the signal requested by the reseller. The Tariff incorporates a Technical Specifications Package (TSP), which sets forth a detailed listing of these standards for VG 7 service. The choice by the resellers of whether to purchase two-wire or four-wire circuits depends upon the capabilities of the resellers' system; they may purchase the less expensive two-wire circuit only if the transmission standards

set forth in the Tariff and TSP are being met. For example, as long as attenuation distortion remains at or below the level set forth in the TSP, the reseller may use a two-wire circuit in obtaining VG 7 service. But as soon as attenuation distortion increases to an unacceptable level (as defined by the TSP), the reseller must use a four-wire circuit.

In January 1991, SWBT began requiring Access to purchase VG 7 service on the more expensive four-wire circuit. SWBT claimed it had to charge this rate because the distance from SWBT's central office to the connection point (the "local loop connection") exceeded 6,000 feet in length. SWBT contends that distortion and echo loss increase to unacceptable levels (as defined by the TSP) when the distance gets beyond 6,000 feet, making it impossible consistently to maintain VG 7 quality on a two-wire circuit. Thus, in order to comply with the quality standards set forth in the Tariff and TSP, SWBT maintains that it must run VG 7 service on a four-wire circuit for local loop connections exceeding 6,000 feet.

Access points out that the length of the resellers' local loop connection is not a specification set forth in the Tariff or the TSP. Access argues that this arbitrary 6,000-foot limit on two-wire circuits violates federal law because, in establishing this limit, SWBT is not abiding by the terms of the Tariff. Under the terms of the Tariff, Access maintains it is entitled to receive VG 7 service on the less expensive two-wire circuit. Access seeks to have the District Court grant it relief against SWBT on this federal law claim.

II.

A. Primary Jurisdiction Doctrine

In their briefs, both parties argue based on the assumption that we review de novo the issue of whether the doctrine of primary jurisdiction was properly applied by the District Court.[2] Without deciding the standard-of-review question, which is best left to be resolved in a case in which it is contested, we accept the parties' invitation to review the primary jurisdiction issue de novo.

Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making. *See Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988). The doctrine allows a district court to refer a matter to the appropriate administrative agency for a ruling in the first instance, even when the matter is initially cognizable by the district court. *See Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R. Co.*, 685 F.2d 255, 259 (8th Cir. 1982). There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction. *See United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Rather, in each case we consider whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created. *See United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984). We are always reluctant, however, to invoke the doctrine because added expense and undue delay may result. *See id.*

One reason courts apply the doctrine of primary jurisdiction is to obtain the benefit of an agency's expertise and

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[2] Both parties cite *National Communications Ass'n v. AT&T*, 46 F.3d 220, 222 (2d Cir. 1995).

experience. The principle is firmly established that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference v. United States*, 342 U.S. 570, 574 (1952). In fact, agency expertise is the most common reason for applying the doctrine. *See Barlow*, 846 F.2d at 476. Another reason is to promote uniformity and consistency within the particular field of regulation. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976).

Access points to the distinction between a challenge to the reasonableness of a tariff and a challenge that a tariff has been violated. The former is properly brought before an administrative agency, while the latter is properly brought before a court. *See Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 131-32 (1915). Access argues that, because the sole issue is whether SWBT violated the Tariff, the action belongs in district court. We disagree.

Congress granted to the FCC the authority to determine whether "[a]ll charges, practices, classifications, and regulations" are reasonable. 47 U.S.C. § 201(b). Here, SWBT is classifying Access under a four-wire circuit price schedule. The issue is whether the 6,000-foot limitation is a reasonable classification. This action clearly falls within the FCC's statutory authority to determine the reasonableness of SWBT's classification. *See id.*

Furthermore, to determine whether the classification is reasonable, it will be necessary to become embroiled in the technical aspects of VG 7 service. The FCC has far more expertise than the courts on matters such as circuit designs,

signal transmissions, noise attenuation, and echo return loss. Thus, the need to draw upon the FCC's expertise and experience is present here. "[W]here words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application," as is the case here, the issue should first go to the appropriate administrative agency. *Western Pac.*, 352 U.S. at 66.

We conclude that the District Court did not err by determining that under the primary jurisdiction doctrine the court should stay its hand to allow the FCC to consider the issues raised in Access's complaint.

B. District Court's Dismissal

After the District Court determined that primary jurisdiction rested with the FCC, it dismissed the suit. A district court "has discretion either to [stay the case and] retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

The District Court did not abuse its discretion in dismissing the suit. Access argues that, because a dismissal does not toll the statute of limitations, Access could be unfairly disadvantaged if it chose to refile in federal court after the FCC renders a decision on its claim against SWBT. Access's argument is without merit.

Because we hold today that the doctrine of primary jurisdiction applies, Access's next course of action regarding this claim will be to petition directly to the FCC. *See* 47 U.S.C. § 208(a). Then, the FCC is statutorily obligated to investigate the complaint, *see id.*, and issue an order within five months. *See* 47 U.S.C.A. § 208(b)(1) (West Supp. 1997). The FCC's

order is then final and may be appealed. *See* 47 U.S.C. § 208(b)(3). If either Access or SWBT chooses to seek judicial review of the FCC's final order, it would do so under 47 U.S.C. § 402(a), which provides that appeals "shall be brought as provided by and in the manner prescribed in chapter 158 of title 28." *See id.* § 402(a). Thus, an aggrieved party would file a petition for review in a court of appeals wherein venue lies within sixty days after the entry of the FCC's final order. *See* 28 U.S.C. §§ 2342(1) (jurisdiction of court of appeals, 2343 (venue), and 2344 (sixty-day filing period). The statute of limitations applicable to the original action in the District Court therefore is not implicated, and Access is not unfairly disadvantaged by the District Court's dismissal.

III.

For the above reasons, we conclude that the District Court did not err in applying the doctrine of primary jurisdiction to this case. Moreover, we hold that the District Court did not abuse its discretion in dismissing the suit. Accordingly, we affirm the order of the District Court in all respects.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96-CV-1288 (CEJ)

ACCESS TELECOMMUNICATIONS, L.L.C., et. al,

Plaintiffs,

v.

SOUTHWESTERN BELL TELEPHONE TELEPHONE *(sic)*,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion to dismiss [Doc. 6]. *See* Fed. R. Civ. P. 12. Plaintiffs have filed a response in opposition to the motion.

Plaintiffs bring this action pursuant to the Communications Act of 1934, 47 U.S.C. §§ 202, 203 and 207, to recover alleged overcharges by defendant for telephone access services.

Plaintiff Access Telecommunications ("Access") is a re-seller of long distance telephone services. Access offers such services by interconnecting lines of the local carrier, defendant Southwestern Bell Telephone ("SWBT"), to lines of long distance carriers. SWBT allows re-sellers such as Access to

control the quality and cost of the interconnection by allowing them to choose from one of twelve different voice grades ("VG"). VG 1 represents the lowest level of quality in terms of factors such as distortion, and VG 12 represents the highest level of quality. Charges for the interconnection increase as the level of the VG increases. SWBT applies these charges in accordance with tariffs filed with the Federal Communications Commission ("FCC"). 47 U.S.C. § 203 (requiring common carriers to file tariffs with the FCC). SWBT's filed tariffs not only list charges for each VG level but also mandate certain technical design parameters corresponding to each VG level to achieve the desired quality of service.

In this action, Access selected a VG 7 interconnection but claims that SWBT's charges exceeded the filed tariff rate. Access alleges that SWBT's VG 7 tariff sets out two price schedules. Depending on the technical specifications of the re-seller's system, SWBT uses a 4-wire circuit or a 2-wire circuit interconnection. A VG 7 interconnection with a 4-wire circuit has a higher price schedule than a 2-wire circuit. Access claims that its technical specifications only required the less expensive 2-wire circuit. However, SWBT contends that Access' technical specifications necessitated use of a 4-wire circuit. SWBT claims that if it used the 2-wire circuit, Access would not receive VG 7 quality service. Accordingly, SWBT assessed charges under the VG 7, 4-wire circuit price schedule. In its motion to dismiss, SWBT argues that this matter should be referred to the FCC to determine whether its decision was reasonable.

Generally, a party claiming damages against a common carrier has its choice of forum. The party may file a complaint either with the FCC or in federal court. 47 U.S.C. § 207. However, in some circumstances, the doctrine of primary

jurisdiction empowers a court to refer the case to the administrative agency. An agency has primary jurisdiction if the case requires the "resolution of issues" falling within the agency's "special expertise and competence." *Southwestern Bell Telephone Co. v. Allnet Communications Servs., Inc.*, 789 F. Supp 302, 304 (E.D. Mo. 1992). Four factors are considered by the court in making the determination: 1) whether the issue falls within the "conventional experience of the judge;" 2) whether the issue falls "peculiarly within the agency's discretion" or "expertise;" 3) whether there is a "danger of inconsistent rulings disruptive of a statutory scheme;" and 4) whether the parties have presented the issue to the agency. *Id.* (citing *In re Long Distance Telecommunications Litigation*, 612 F. Supp. 892, 897 (E.D. Mich. 1985)).

The FCC has authority to determine whether a common carrier is using reasonable "charges, practices, [and] classifications." 47 U.S.C. § 201(b); *Allnet*, 789 F. Supp. at 304-05. The doctrine of primary jurisdiction is most often discussed in the context of whether a common carrier's charged rates are reasonable. *See Allnet*, 789 F. Supp. at 304 (citing *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976)) Although there is no dispute in the instant action about the reasonableness of SWBT's tariff rates, the central issue concerns whether SWBT acted reasonably in classifying Access under a 4-wire circuit price schedule. Thus, this action falls within the FCC's statutory authority of determining the reasonableness of SWBT's practices/classification of rates. 47 U.S.C. § 201(b).

Furthermore, the FCC has primary jurisdiction according to the four part test. SWBT raises technical reasons about Access' system (*i.e.*, length of the local loop interconnection) to explain why it needed to use the 4-wire circuit. Because an

interpretation of SWBT's technical justifications falls outside the Court's conventional experience and squarely within the FCC's discretion or expertise, this action satisfies the first two factors of the primary jurisdiction test. As for the third and fourth factors, the parties have not presented this issue to the FCC, and the Court finds no apparent danger of inconsistent rulings with an agency decision. However, given the extremely technical nature of the dispute, the Court concludes that the primary jurisdiction doctrine should be applied.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion to dismiss is GRANTED and that this action is DISMISSED under the doctrine of primary jurisdiction. [Doc. 6].

/s/ Carol E. Jackson
UNITED STATES DISTRICT JUDGE

Dated this 25th day of February, 1997.

APPENDIX C

The relevant portions of the Federal Communications Act provide:

47 U.S.C. § 201. Service and charges.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the [Federal Communications] Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act [47 U.S.C. §§ 151 et seq.] may be classified into day, night, repeated, unrepeated, letter, commercial, press Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the

Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

47 U.S.C. § 203. Schedules of Charges.

(a) Filing; public display. Every common carrier, except connecting carriers, shall, within such reasonable time as the [Federal Communications] Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act [47 U.S.C. §§ 151 et seq.] when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection and in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements.

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates. No carrier, unless otherwise provided by or under authority of this Act [47 U.S.C. § 151 et seq.] shall engage, or participate in such communication unless schedules have been filed and published in accordance with the provisions of the Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal. The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations. In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 207. Recovery of Damages.

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

APPENDIX D

List of Cases Decided in 1998
on the Basis of the Filed Rate Doctrine

American Tel. & Tel. Co. v. Central Office Telephone, Inc., 118 S.Ct. 1956 (1998)

Caribbean Shippers Ass'n, Inc. v. Surface Transp. Bd., 1998 WL 306567 (D.C.Cir., Jun 12, 1998) (NO. 97-1346)

Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479 (2d Cir. 1998)

Koch Gateway Pipeline Co. v. F.E.R.C., 136 F.3d 810 (D.C.Cir., 1998)

Marcus v. AT&T Corp., 138 F.3d 46, (2nd Cir. 1998)

Public Service Co. v. Patch, 136 F.3d 197(1st Cir. 1998)

Southeastern Michigan Gas Co. v. F.E.R.C., 133 F.3d 34 (D.C.Cir.1998)

Broughton v. Global Van Lines, Inc., 1998 WL 401623 (N.D.Tex., Jul 10, 1998)

Worldcom Network Services, Inc. v. UMG Communications Groups, Inc., 1998 WL 341830 (N.D.Ill., Jun 04, 1998)

National Communications Ass'n, Inc. v. American Tel. & Tel. Co., 1998 WL 118174 (S.D.N.Y., Mar 16, 1998)

Zorba v. Advanced Telecommunications Network, Inc., 1998 WL 67622 (N.D.Ill., Feb 11, 1998)

Euclid Ins. Agencies, Inc. v. American Ass'n of Orthodontists, 1998 WL 60775 (N.D.Ill., Feb 05, 1998)

Goldwasser v. Ameritech Corp., 1998 WL 60878 (N.D.Ill., Feb 04, 1998)

Supreme Court, U.S.
FILED
SEP 21 1998
OFFICE OF THE CLERK

(2)

No. 98-199

In The

Supreme Court of the United States

October Term, 1997

ACCESS TELECOMMUNICATIONS, L.L.C., formerly known as UNIFIED TELECOMMUNICATIONS, L.L.C., on behalf of itself and all others similarly situated,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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1998

QUESTION PRESENTED

Petitioner wholly mischaracterizes the issue before this Court. Petitioner frames the issue as whether the doctrine of primary jurisdiction should be applied ". . . so as to eviscerate the filed rate doctrine. . . ." Petitioner states that the issue at stake is the "continuing vitality of the filed rate doctrine." The filed rates doctrine has absolutely nothing to do with this case. The District Court below dismissed Petitioner's case based upon the *primary jurisdiction doctrine*, not the *filed rates doctrine*. The "filed rates" doctrine stands for the proposition that both the carrier and the customer are bound by the terms of legally filed tariffs. Respondent SWBT concedes that SWBT is obligated to follow the terms of its own filed tariffs. There is no question about that. The issue below was not whether SWBT was bound to follow its own tariffs, but rather which entity — the District Court or the FCC (the federal agency charged with interpreting SWBT's tariffs) —was entitled to make the primary determination. In other words, the issue was not whether the pitch was a ball or a strike, but rather which umpire was entitled to make the call. Petitioner purposely obfuscates the issue before the Court in a vain attempt to create some type of conflict between the case at bar and this Court's recent filed rates doctrine case, *American Tel. And Tel. Co. v. Central Office Telephone, Inc.*, 118 S. Ct. 1956 (1998). No such conflict exists. The appropriate statement of the issue before the Court is the following:

Did the District Court err in applying the doctrine of primary jurisdiction to Plaintiff's claim for a refund of the difference between two tariffed rates for a particular telecommunications service, where resolution of the claim will necessarily require an interpretation of complex and technical tariff specifications which are part of a comprehensive regulatory scheme and which have been placed within the special competence of the Federal Communications Commission?

PARTIES TO THE PROCEEDING

The parties to the proceeding are: Access Telecommunications, L.L.C., formerly known as Unified Telecommunications, L.L.C., on behalf of itself and all others similarly situated, Petitioner, and Southwestern Bell Telephone Company, Respondent. The parent company for Respondent is SBC Communications Inc. and Respondent has no nonwholly owned subsidiaries.

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TABLE OF CITED AUTHORITIES

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Cases:

American Tel. & Tel. Co. v. Central Office Telephone, Inc., 524 U.S. __, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998) ..... i, 7, 8, 13

Maislin Industries 7, 8, 13

United States v. Primary Steel, Inc., 497 U.S. 116 (1990) 7

United States v. Western Pacific Railroad Company, 352 U.S. 59, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956) ... 9, 10, 11

Statutes:

47 U.S.C. § 201(b) 6

47 U.S.C. § 203 2

Rules:

Supreme Court Rule 10 ..... 12, 13, 14

Supreme Court Rule 10(a)-(c) 13

STATEMENT OF THE CASE

A. The Technical Specifications of the Tariff

Petitioner Access glosses over some of the important facts which were critical to the decision of the United States Court of Appeals for the Eighth Circuit.[1] Specifically, Petitioner Access fails to point out to the Court the highly technical nature of the inquiry which will be necessitated by its lawsuit, an inquiry best resolved by the FCC, which can apply its technical expertise and ensure uniformity of the regulatory scheme.

Petitioner Access is a re-seller of long distance service. App. 2a. Access is able to offer this service by connecting customers to various long distance providers using SWBT's local lines. App. 2a. SWBT is required to offer inter-connection customers various voice grades, ranging from 1 to 12, which determine the quality of service on the circuit. App. 3a. The customer can decide which grade of service is best for him/her. VG 1 is the lowest grade service; VG 12 is the highest. App. 3a. Petitioner sought to purchase VG 7 circuits from SWBT. App. 3a.

As required by federal law, common carriers like SWBT must file with the FCC tariffs setting forth a schedule of charges for the

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1. It should also be noted that Petitioner completely misrepresents the Eighth Circuit's decision below. Petitioner states that the Eighth Circuit held that " . . . before Access could sue, the FCC should determine whether *Southwestern Bell's violation of its tariff was nevertheless reasonable*." This statement suggests that the Eighth Circuit held that SWBT violated the terms of its own tariff, but that this would be permissible as long as the violation was deemed "reasonable." That is simply a fabrication from whole cloth. To the contrary, the Eighth Circuit made no determination whatsoever as to whether the tariff was violated. In fact, this very issue was deferred to the FCC. Petitioner's misrepresentations of fact and law to this Court should be considered in determining whether to grant certiorari.

various services they provide. *See* 47 U.S.C. § 203. Accordingly, SWBT filed FCC Tariff No. 73 which established charges for each VG level. App. 3a. The FCC approved the Tariff, and SWBT agrees with Petitioner that SWBT must provide access services pursuant to the terms of the Tariff. App. 3a.

The Tariff provides that SWBT must provide VG7 service in conformance with specific technical transmission standards. The Tariff incorporates a Technical Specifications Package ("TSP") into the Tariff. App. 3a. The TSP sets forth the exact technical parameters which must be met in order to provide VG7 service. As one example, there is a specific technical parameter for "echo control", App. 3a, which relates to the amount of echo heard over the line. If SWBT provides service with too much echo such that it does not meet the minimum parameters for echo control in the TSP, then SWBT violates the Tariff. Thus, at all times, SWBT must make sure that it can *consistently* meet these technical service requirements for the customer. The TSP has seventeen subsections relating to specific technical parameters, which include the following:

- Available Signaling
- Available Options
- Loss Deviation
- Three-Tone Slope
- Attenuation Distortion
- Envelope Delay Distortion
- C-Message Noise
- C-Notched Noise
- Impulse Noise
- Signal to Intermodulation Distortion Ratio
- Phase Jitter
- Frequency Shift
- Phase Hit, Gain Hit, and Dropout Performance
- Echo Control

- VG 7-Compatible EU-NI, IC-POT, and CO-NCI Code Combinations
- VG 7- Compatible TLP Ranges at the EU-NI
- VG 7-Compatible Ranges at the IC-POT

Supplemental Appendix filed with the United States Court of Appeals for the Eighth Circuit ("SA"), p. 102. Each of these subsections, in turn, contains a complex listing of acceptable engineering levels within each category to ensure the type of quality of signal requested by the customer. For example, under the heading "Echo Control," the TSP provides as follows:

5.9.14 Echo Control

Transmission and Test Configuration		Type of Measurement	AL (dB)		IAL (dB)	
Measure @	Terminate @		ERL	SRL	ERL	SRL
Effective 2-Wire Transmission						
EU-NI (2W) or CO (2W)‡	IC-POT (4W)	STD-RL	5.5	3	5	2.5
		IMP-RL *	15	9	13	8
IC-POT (4W)	EU-NI (2W) or CO (2W)‡	ELEPL-1	7.0	4.5	5.5	2.5
		ELEPL-2 *	18	12	16	11
4-Wire Transmission with 2-Wire Interface						
EU-NI (2W) or CO (2W)‡	IC-POT (4W)	RL	26	20	24	18
IC-POT (4W)	EU-NI (2W) or CO (2W)‡	ELEPL	23	16	20	14

SA 117. There are similar tables of specifications for the other parameters as well. SA 113-122. Needless to say, these specifications are highly complex and technical in nature.

Petitioner Access argues that in January 1991, SWBT forced it to purchase VG 7 service on a "four-wire circuit" instead of the less-expensive "two-wire circuit" for all circuits where the distance from the central office to the connection was over 6,000 feet in length. App. 4a. SWBT required this charge because Bellcore — the same group which developed the technical specifications listed above — determined through scientific testing that when the circuit length gets over 6,000 feet, it becomes difficult if not impossible to consistently maintain the quality parameters for VG 7 service found in the tariff. App. 4a. When the distance gets beyond 6,000 feet, "attenuation distortion" and "echo return loss" increase to unacceptable levels — levels which do not comply with the TSP. App. 4a.

Petitioner Access argues that the 6,000-foot classification was an "off-Tariff pricing criteria." Not so. It is true that the words "6,000 feet" appear nowhere in the Tariff. However, SWBT maintains that a 6,000-foot requirement is the exact same thing as compliance with the TSP's attenuation distortion and echo loss parameters. An analogy makes this point clear. If a tariff provided that SWBT must consistently ensure that a customer's pot of water was boiling, SWBT could require the customer to make sure his stove could heat up to a minimum of 212 degrees Fahrenheit, because, as a matter of science, the boiling point of water is 212 degrees. This is so even if the words "212 degrees Fahrenheit" are nowhere listed in the tariff. The 6,000-foot requirement is not an arbitrary off-Tariff pricing criteria. It is a classification based upon science, a classification imposed in order to ensure that the very terms of the Tariff are followed.

B. Course of Proceedings and Disposition Below

Access brought suit under the Communications Act of 1934 on behalf of itself and other SWBT customers receiving VG7 service on the more expensive 4-wire circuit since January 1991. SWBT moved to dismiss the case without prejudice under the doctrine of primary jurisdiction, arguing that the FCC was better-equipped to handle the question of the reasonableness of SWBT's tariff classification. The United States District Court for the Eastern District of Missouri dismissed the case without prejudice, finding that the FCC had primary jurisdiction of the dispute. The Eighth Circuit affirmed the dismissal.

Petitioner notes in its Petition for Writ that the Eighth Circuit rendered its decision "without consideration of the filed rate doctrine." App. 4. There is a very good reason why the Eighth Circuit did not rule on the filed rates doctrine — the doctrine is irrelevant at this stage of the proceedings. The first issue before the District Court and the Eighth Circuit was not whether SWBT's application of its tariff was proper or reasonable, but rather which entity — the District Court or the FCC — should make the primary determination. If Petitioner wishes to argue that under the filed rates doctrine, SWBT was obligated to abide by its own tariff, it can make that argument to the FCC when it files its complaint with the FCC.

REASONS FOR DENYING THE WRIT

I.

THE APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE DOES NOT "EVISCERATE" THE FILED RATES DOCTRINE.

Petitioner Access erroneously states that the application of the primary jurisdiction doctrine here will spell the "demise of the

filed rates doctrine." App. 5. The primary jurisdiction doctrine only relates to the issue of who will decide the case —the District Court or the FCC. It does not in any way, shape or form prevent Petitioner from arguing the application of the filed rates doctrine. The filed rates doctrine merely provides that the carrier and customer are both bound by the terms of the Tariff. There is no dispute about that. SWBT agrees that it has to provide VG7 service by the terms of the Tariff. SWBT contends that it is doing just that — by using scientific principles, SWBT is ensuring that all the parameters of the Tariff are met. It is Petitioner Access who seeks to stray from the Tariff. If Access were allowed to use a two-wire circuit for its business locations which are greater than 6,000 feet from SWBT's central office, SWBT would be unable, as a matter of simple science, to comply with the terms of the Tariff.

Petitioner Access apparently disputes this scientific conclusion, and contends that there are some 2-wire circuits over 6,000 feet in length which can still satisfy the TSP's requirements for attenuation distortion and echo control. Therefore, the resolution of this controversy will necessarily boil down to a battle over science — over such matters as attenuation, echo return loss, C-message noise, envelope delay distortion, frequency shifts, impulse noise, intermodulation distortion, gain hits, phase jitter, wire gauge, signal-to-C message noise, signal-to-notch noise, and so on. This is obviously not an area with which Courts have developed special technical expertise.

The FCC, however, does possess such expertise. The FCC is specifically charged with the responsibility of determining whether "all charges, practices, classifications and regulations" involving tariffed telecommunications services are reasonable. 47 U.S.C. § 201(b). The FCC has far more expertise than courts in determining circuit designs, signal transmissions, noise attenuation, echo loss, and so on. App. 6a-7a. It is for this reason that the United States Court of Appeals for the Eighth Circuit affirmed the District

Court's decision to dismiss without prejudice Petitioner's Complaint in federal court, in order to allow the Petitioner to first proceed to a resolution of these issues before the FCC. After the FCC makes its determination on the technical issues under the Tariff, if Access prevails, then this case can return to federal court for any necessary trial on damages.

II.

THIS CASE DOES NOT CONFLICT WITH *CENTRAL OFFICE TELEPHONE* OR *MAISLIN.*

Petitioner Access contends that the Eighth Circuit's decision conflicts with this Court's decision in *American Tel. & Tel. Co. v. Central Office Telephone, Inc.*, 524 U.S. __, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998) and *Maislin Industries, United States v. Primary Steel, Inc.*, 497 U.S. 116 (1990). To the contrary, there is no conflict whatsoever. In *Central Office Telephone*, a re-seller experienced problems with the Software Defined Network ("SDN") service provided by AT&T. SDN is a service in which employees in different locations are allowed to communicate easily. For example, an employee in Washington can call a co-worker in Denver simply by pressing a four-digit extension. The re-seller filed suit in federal court against AT&T, alleging that: (1) the re-seller's contracts with AT&T were not limited by the terms of the FCC tariff filed by AT&T, but also included representations made by AT&T's employees and sales literature; and (2) AT&T had promised the re-seller certain service, provisioning, and billing options in addition to those set forth in the tariff. AT&T argued that the re-seller's state law contract and tort claims were preempted by the filed tariff doctrine, since AT&T was only required to provide the service delineated in the tariff, and no more. The District Court disagreed and allowed the jury to consider matters outside the tariff. The jury found for the re-seller, and the Ninth Circuit affirmed.

This Court granted certiorari and reversed. The Court held that the filed rates doctrine applies not only to the Interstate Commerce Act (the statute which was relevant in the *Maislin* decision), but also to the Federal Communications Act. *Id* at 233. The Court held that the carrier is only required to provide the services listed in the tariff at the rates listed in the tariff and no more. This minimal obligation applies even where the carrier intentionally misrepresents its rate and a customer relies on it. *Id*. If the quoted rate is different from the tariffed rate, the tariffed rate applies. While this result may seem harsh in some circumstances, the Court held, the strict application was necessary to prevent discrimination in rates. *Id* at 233. The Court also rejected the re-seller's argument that the doctrine should only apply to disputes over "rates," not "services," holding that any claim for rates could be couched in terms of services.

This case, of course, does not even mention the words "primary jurisdiction doctrine." The issue was never raised. Accordingly, it is difficult to understand how Petitioner can contend that there is a conflict between the two cases. The two cases simply address wholly different subjects. *Central Office Telephone* concerned the application of the strict terms of the tariff in the face of alleged misrepresentations or promises outside the terms of the tariff. The case at bar, in contrast, merely concerns which adjudicator will make the decision — the District Court or the FCC.

III.

PETITIONER'S ARGUMENT REGARDING IMPROPER EXPANSION OF THE PRIMARY JURISDICTION DOCTRINE MUST FAIL.

Petitioner next contends that the Eighth Circuit improperly expanded the primary jurisdiction doctrine. This argument also

fails. The decision of the Eighth Circuit was directly in line with this Court's decision in *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956). In *Western Pacific*, the United States Government paid railroad companies to ship certain merchandise. The rates which the Government was required to pay for the carriage were set forth in published tariffs. There were several tariffs relating to the shipment of dangerous and explosive merchandise. The tariffs specifically provided for one rate for "incendiary bombs" and one rate for "gasoline in steel drums." The tariffed rate for "incendiary bombs" was higher, presumably because it took greater care and cost to handle bombs versus gasoline. The Army sought to ship by rail 211 containers of steel aerial bomb cases filled with napalm gel. Napalm gel is gasoline which has been thickened by the addition of aluminum soap powder. The mixture is flammable but not self-igniting. In a completed incendiary bomb, the napalm gel is ignited by white phosphorous contained in a burster charge, which in turn is fired by a fuse. The Government argued that they were not required to pay the "incendiary bomb" tariffed charge because the burster and fuse were not contained in the shipments. The railroad carriers disagreed and sued to obtain the difference between the "gasoline in steel drums" tariffed rate and the "incendiary bombs" tariffed rate. The Government argued that the issue should be resolved by the Interstate Commerce Commission first under the doctrine of primary jurisdiction. The United States Court of Claims disagreed, and entered summary judgment for the railroad, holding that the shipments were "incendiary bombs."

On certiorari, the Supreme Court of the United States reversed and remanded, holding that the case should have been referred to the ICC under the doctrine of primary jurisdiction. Interestingly, the Court rejected the railroad's argument that primary jurisdiction was inappropriate *where the only question was the construction of a tariff, as opposed to a challenge to the reasonableness of the tariff*:

> We have concluded that in the circumstances here presented the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the [ICC].
>
> * * *
>
> . . . courts must not only refrain from making tariffs, but, under certain circumstances, must decline to construe them as well. **[W]here words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that "the inquiry is essentially one of fact and of discretion in technical matters," then the issue of tariff-application must first go to the Commission**. The reason is plainly set forth: such a "determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." [citations omitted]. (emphasis added)

Id. at 63, 66. The Supreme Court concluded that complex and technical cost-allocation and accounting principles were initially used to set the railroad's tariffs. The Court held that in order to determine if napalm gel should be construed as falling under the incendiary bomb tariff, the decision maker would necessarily be required to have a working knowledge of these technical matters. *Id.* at 66-67. The Court held that resolving the question would involve ". . . more than simply a question of reading the tariff language or applying abstract 'rules' of construction." To decide the issue without a familiarity with these technical issues would,

in the Supreme Court's view, ". . . make the process of adjudication little more than an exercise in semantics." *Id.* at 67.

This case is directly applicable to the case at bar. Petitioner Access is claiming that SWBT should have charged it the two-wire tariffed rate instead of the four-wire tariffed rate. Access claims that this is a matter of simple tariff construction and enforcement. But, as in *Western Pacific*, this case involves more than simply reading the tariff language and applying abstract rules of construction. In order to determine why SWBT established a 6,000 foot cut-off, and why it was necessary to charge a four-wire rate, it will be necessary for the Court to become embroiled in the technical aspects of circuit design and signal transmission. The Court will necessarily have to have a working knowledge of concepts such as noise attenuation, echo return loss, C-message noise, envelope delay distortion, loss deviation, phase hits, phase jitter, signal-to-C message noise, signal-to-C notch noise, impulse noise and intermodulation distortion. The Court will necessarily have to wade through the thicket of the Technical Specifications Package. The Court will have to become intimately familiar with the field and simulation testing of Bellcore, Inc. As in *Western Pacific*, this will require voluminous extrinsic evidence just to explain what the tariff means. This is obviously not an appropriate matter for district courts to determine in the first instance. This is a perfect case for application of the primary jurisdiction doctrine. The district court was correct in dismissing the case without prejudice to allow the Petitioner to pursue the technical aspects of its claim with the FCC, the agency charged with understanding and administering these technical tariffs. To do otherwise would make the district court's adjudication "little more than an exercise in semantics."

IV.

PETITIONER'S REQUEST FOR A WRIT DOES NOT MEET THE STANDARDS OF RULE 10.

Supreme Court Rule 10 specifically provides that review on certiorari "is not a matter of right, but of judicial discretion," and is only granted for "compelling reasons." The Court's suggested list of compelling reasons includes:

> (a) (1) a United States Court of Appeals decision in conflict with another U.S. Court of Appeals decision on the same important matter;
>
> (2) a United States Court of Appeals decision on an important federal question which conflicts with a decision by a state court of last resort;
>
> (3) a United States Court of Appeals decision which has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or
>
> (c) (1) a state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court;

> (2) a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court;
>
> (3) a state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this Court; or
>
> ***(4) a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.***

See S. Ct. Rule 10(a)-(c).

It is clear that none of the scenarios in subsections (a) through (c)(3) are applicable here. The only argument made by Petitioner in this case is subsection (c)(4) — namely, that the Eighth Circuit's decision conflicts with this Court's decisions in *Central Office Telephone* and *Maislin*. Since those cases involved the filed rates doctrine, and not the primary jurisdiction doctrine, it is difficult to see how that provision is applicable. Therefore, there simply is no basis under Rule 10 for the grant of certiorari.[2]

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2. In addition, Rule 10 states that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or *the misapplication of a properly stated rule of law*. Petitioner here is alleging a "misapplication of a properly stated rule of law."

CONCLUSION

Because Petitioner has failed to satisfy the threshold requirements of S. Ct. Rule 10, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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